STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 13, 2003
v	No. 239994 Wayne Circuit Court
ANTHONY GILBERT, Defendant-Appellant.	LC No. 01-000561-01

Before: Schuette, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant's first trial ended in a mistrial after the jury was unable to reach a verdict. At his second jury trial, defendant was convicted of armed robbery, MCL 750.529, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. He was sentenced to eleven to seventeen years' imprisonment. Defendant appeals as of right, and we affirm.

The complainant testified that she parked her car in a pharmacy parking lot and went inside. The weather was clear and it was still light out. When she returned a "candy-apple red" four-door Caprice was parked very close to her car. She had difficulty opening her car door because the Caprice was parked so close. When the complainant attempted to get into her car, defendant pointed a revolver at the complainant's chest and demanded complainant's money and purse. Defendant left with the complainant's purse after warning the complainant not to go to the police because he now had the complainant's identification and knew where she lived. The complainant drove home, where a family member called the police to report the robbery.

I

Defendant fist argues that he was denied the effective assistance of counsel when trial counsel for his second trial failed to attempt to locate or secure the presence of defendant's alibi witnesses. We disagree.

At defendant's first trial, his attorney put on the record that he had made at least eight phone calls, attempting to reach defendant's alibi witnesses. Late in the trial, counsel reached someone by telephone at one of the contact numbers for the alibi witnesses, but no alibi witnesses appeared at the first trial. Defendant's attorney for his second trial told defendant that

he would send an investigator to find defendant's alibi witnesses, but did not produce these witnesses at trial. Defendant now argues that he was denied effective assistance of counsel.

This Court reviews a claim of ineffective assistance of counsel to determine whether trial counsel's performance fell below an objective standard of reasonable professional conduct and representation to the extent that it denied defendant a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Apart from defendant's own affidavit, the record is silent regarding why defendant's counsel at his second trial chose to proceed to trial without the alibi witnesses. Defendant filed a motion with this Court requesting a remand to the trial court for a *Ginther*[1] hearing. This Court denied the motion, stating, however, that the Court would consider another motion for remand if accompanied by affidavits from the alibi witnesses. These affidavits have never been produced, and without them defendant cannot show that he was prejudiced by his trial counsel's decision to go forward without the unwilling or unavailable alibi witnesses. Therefore, defendant cannot show that his trial counsel was ineffective for failing to produce the alibi witnesses.

II

Defendant next asserts that he was denied due process and a fair trial by the prosecutor's argument that he stole and burned the car used in the robbery. We disagree.

The complainant described the car that defendant used during the robbery as a candy-apple red Chevrolet Caprice. A burgundy or maroon Chevrolet Caprice was stolen a few days before the robbery, not far from the parking lot where the robbery took place. Neither location was far from defendant's residence. The stolen car had been burned by the time it was found, and its remains were found fifty to one hundred yards from defendant's residence. Defendant contends that the prosecutor's closing argument usurped the role of the jury by leading the jury to believe that defendant stole the car, used it during the robbery, and then burned it near his home.

This Court reviews preserved claims of prosecutorial misconduct de novo to determine whether the alleged prosecutorial misconduct denied defendant a fair and impartial trial, but reviews unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 720-721; 613 NW2d 370 (2000), citing *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). Prosecutors may not argue facts to the jury that are unsupported by the evidence, "but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case." *Schutte, supra* at 721, citing *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant only preserved for appeal the prosecutor's implication that defendant was the person who "torched" the stolen car. However, the prosecutor only argued that people could easily conclude that defendant was the person who set the car on fire. Given the proximity of defendant's home to what was left of the stolen car at the time it was found, this was a

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

permissible argument calling for inferences based on the facts adduced at trial. See *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001).

Defendant did not preserve his claim on appeal that the prosecutor asserted that both the stolen car and the car used in the robbery had been described as candy apple red, improperly drawing the conclusion that the stolen car and the car used in the robbery were the same vehicle. However, the prosecutor's characterization of the car's color must be reviewed in the context of parties' arguments and comments as a whole. *Schutte, supra* at 721. While it is true that the prosecutor first characterized the burned car as matching the complainant's description of the color as candy apple red, he later argued that the car was a candy apple red, "described as maroon," and that the color of the car was in the "red family." Overall, the prosecutor's argument about the color of the robber's car as it related to the color of the burned car was a permissible interpretation of the evidence, and any inaccuracy could have been cured by a timely objection. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003); *Watson, supra* at 590.

Defendant further contends that the prosecutor impermissibly mischaracterized the distance between defendant's residence and the spot where the remains of the stolen car were found. The prosecutor's comments in this regard were in error, but defendant does not show how he was prejudiced by this error. Testimony indicated that the stolen car was found fifty to one hundred *yards* away from defendant's home. The prosecutor's closing argument stated that the car was fifty to one hundred *feet* away from defendant's home when it was either found or stolen. It is unlikely that the isolated mistake of "feet" versus "yards" prejudiced defendant. *Bahoda*, *supra* at 261-263. This is particularly true in light of the prosecutor's telling the jury at the beginning of his closing argument that it should rely on its collective memory of the facts, and not his argument, and the trial court's instruction to the jury that the attorneys' arguments were not evidence. The prosecutor's comments did not deny defendant a fair and impartial trial, and did not implicate his due process rights.

III

Finally, defendant argues that the trial court abused its discretion by admitting inadmissible hearsay regarding the complainant's testimony about her earlier statements to police concerning defendant's distinguishing features. Defendant also argues that the testimony of Officer Joseph Moore, relating complainant's statements were hearsay. Again, we find no error.

The defense, in its opening argument, noted that complainant's testimony had been inconsistent over time, and noted that the prosecutor had structured his case for "maximum flexibility." On redirect examination, the prosecutor asked the complainant if she wrote in her witness statement that defendant had a gap in his teeth, and she answered that she had. The prosecutor then asked her if any person from the police department or representative from the prosecutor's office had told her that defendant had a gap in his teeth, and the complainant answered that no one had. Defendant did not object at trial to the content of this testimony, therefore we review this portion of defendant's claim for plain error. *Carines, supra* at 763.

Under MRE 801(d)(1)(B), a statement is not hearsay if the declarant testifies at trial and is subject to cross-examination, and the statement is "consistent with the declarant's testimony

and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." It was not plain error for the trial court to admit this testimony when the defense had already implied that the complainant's testimony was improperly influenced by the police or the prosecution.

Prior consistent statements are also admissible through a third party if the requirements of MRE 801(d)(1)(B) are satisfied. Officer Moore testified about the complainant's description of defendant, which was a prior consistent statement, but also testified that he had never suggested to the complainant a description of defendant's teeth. It was implied by the defense's questioning of Moore, as well as defendant's opening statement and the defense's questions to the complainant and the officers who initially responded to the robbery call, that Moore had implanted the description of defendant in the complainant's mind. All of the elements of MRE 801(d)(1)(B) were met, and it was not an abuse of discretion for the trial court to admit this testimony.

Affirmed.

/s/ William D. Schuette
/s/ Mark J. Cavanagh
/s/ Helene N. White